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11 UNITED STATES BANKRUPTCY COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION

14 In re
15 Round Table Pizza, Inc.,
16 Debtor.

Case No. 11-41431 RLE
(Jointly Administered with Case Nos.
11-41432 RLE, 11-41433 RLE, and
11-41434 RLE)

Chapter 11

19 **REQUEST FOR PROTECTIVE ORDER**

20 Judge: Hon. Roger Efremsky
21 Date: TBD
22 Time: TBD
Crtrm.: 1300 Clay Street
Courtroom 201
Oakland, California

1 **I. INTRODUCTION**

2 In the course of a mediation which the Committee solicited, the Committee entered into a
3 binding agreement which afforded a substantially enhanced recovery to unsecured creditors in
4 return for the Committee's commitment to support the Plan of Reorganization. Now that the
5 enhanced Plan is being balloted and cannot be altered, the Committee has reneged, demanding that
6 additional concessions be made, failing which it will oppose confirmation. The vehicle the
7 Committee proposes to use is a resumption of the Rule 2004 Examination of the Debtor. *See*,
8 DECLARATION OF SCOTT H. McNUTT IN SUPPORT OF MOTION FOR PROTECTIVE ORDER ("McNutt
9 Decl.), ¶ 21, Ex. F (Letter from K. Denniston demanding resumption of Rule 2004 Exam).

10 This conduct is entirely inappropriate. The prior Rule 2004 Examination has no
11 connection with the examination the Committee currently proposes. Were the Committee to seek
12 a new Rule 2004 Examination, the Court should deny the request. First, the Committee has waited
13 more than a month to raise these issues, resulting in detrimental reliance, imposing prejudicial
14 expense and creating the risk of delaying the confirmation process. More fundamentally, having
15 committed to support confirmation of the Joint Plan, the Committee should not be permitted to
16 oppose it. A protective Order prohibiting the continued Rule 2004 Examination should be
17 entered.

18 **II. FACTS**

19 **A. The Prior Rule 2004 Examination**

20 From the outset, the Debtor was direct and candid about its desire to prosecute its
21 reorganization in partnership with the Committee and repeatedly asked the Committee to join with
22 it in formulating the terms of a consensual reorganization. As the exclusivity period drew to a
23 close, the Committee finally agreed to meet to discuss the terms of a Plan of Reorganization. The
24 Committee listened to the Debtor's presentation, and advised that it would break to discuss matters
25 over lunch and would then return to present its thoughts about the Plan. It never returned from
26 lunch, nor did it ever provide substantive input about the Plan, other than by filing an Objection.

27 Instead, the Committee sought a Rule 2004 Examination of Round Table with respect to
28 the June 9th Plan of Reorganization and Disclosure Statement. *See*, Application for 2004

1 Examination, Docket No. 603. After a day's examination – for which the estate ultimately paid
2 \$50,000 in professional fees – the Committee deferred any further examination indefinitely.

3 **B. The Mediations and the Joint Plan**

4 In mid-July, the Committee advocated mediation, and the Debtor, GECC and the
5 Committee agreed to engage in mediation before Judge Lafferty, but vacillation and an inability to
6 take a clear position characterized the Committee's approach in the mediations.

7 *See*, McNutt Decl., ¶ 2.

8 Despairing of the possibility that an agreement with the Committee could be reached, or if
9 reached, would “stick”, the Debtor shifted its focus and, in August, negotiated an agreement with
10 GECC which became the basis for the Joint Plan. *See*, McNutt Decl., ¶ 3. Inevitably, funding and
11 financial benefits that might otherwise have been afforded to unsecured creditors were diverted to
12 GECC in consideration for its support for the Joint Plan.

13 **C. The Mediation Agreement**

14 Round Table and GECC concluded that the Committee's support of the Joint Plan would
15 prove valuable. Although Round Table believed that unsecured creditors would broadly accept
16 the Plan regardless of the Committee's position, Round Table perceived some risks of litigation if
17 the Committee opposed confirmation. More significantly, dealing with the Committee had
18 imposed tremendous administrative expenses on the bankruptcy estate, and Round Table expected
19 that if the Committee agreed to support the Plan, that would significantly limit the potential for
20 future fee accruals and make it possible to constrain the Committee's professionals to a budget.

21 In the hopes of obtaining the Committee's support for the Joint Plan, Round Table, GECC
22 and the Committee agreed to attend a mediation session before Judge Lafferty on August 30,
23 2011. *See*, McNutt Decl., ¶ 4. Prior to the mediation, GECC confirmed its agreement (offered in
24 the prior mediation sessions) to provide a “backstop” for the benefit of “non-insider creditors”
25 assuring that an aggregate of \$1.8 million would be distributed to unsecured creditors.

26 Also prior to the mediation, Round Table provided the Committee with a term sheet which
27 specified the agreed treatment of GECC under the Joint Plan and proposed to pay unsecured
28

creditors in full over five years in equal quarterly installments, with interest at the rate of 3.25% paid with the final installment. *See*, McNutt Decl., ¶ 5, Ex. A.

At the outset of the mediation, Round Table advised the Committee that it would pursue confirmation of the Joint Plan with or without the Committee's consent, but that it was prepared to make some concessions in order to obtain the Committee's consent. In the course of the day, various issues were raised and rejected.

Of relevance to the Committee's current demands, the Committee requested that GECC re-affirm its agreement to a backstop. The Debtor expressed reservations about the legality of the backstop,¹ and responded that the backstop was expressly structured as a gift from GECC and thus would not be part of the Plan negotiations. *See*, McNutt Decl., ¶ 6.a. In response to the Committee's question, GECC confirmed that as part of a consensual agreement it would provide a backstop based on \$1.8 million in aggregate distributions to unsecured creditors, and recited the backstop mechanics. *See*, DECLARATION OF GREGORY O. LUNT IN SUPPORT OF MOTION FOR PROTECTIVE ORDER ("Lunt Decl."), ¶¶ 4-5. The Committee did not reject the backstop or make any counterproposal for the backstop at the mediation; in addition, during the weeks following the mediation, the Committee raised no questions or concerns about the backstop with GECC or its counsel. *See*, Lunt Decl., ¶¶ 5-6; *see also*, McNutt Decl., ¶ 6. The other Additional Demand, the continuation of a post-confirmation Committee, was never raised at all. *See*, McNutt Decl., ¶ 11.

By the conclusion of the session, Round Table's final offer to the Committee was the following:

✓ The Plan treatment for unsecured creditors would be enhanced by (i) reducing the repayment period from five years to four years and (ii) increasing the interest rate from 3.25% to 6% (the "Enhanced Payment Terms"), *See*, McNutt Decl., ¶ 7, and in

¹ Although the Committee owes a fiduciary duty to *all* unsecured creditors, it has instead aggressively pursued the interests of the "backstopped creditors," who constitute less than half of the unsecured creditor body it purportedly represents but include *all* of the Committee members. It now threatens to oppose confirmation of a consensual Plan in order to extract additional concessions for the "backstopped creditors." Round Table believes that this is entirely improper.

1 return,

2 ✓ The Committee (i) would support Round Table's opposition to the Round
3 Table Owner's Association's motion to compel rejection of franchise agreements, (ii)
4 would support an extension of exclusivity until the confirmation hearing, and (iii) would
5 support Confirmation of the Joint Plan (the "Support Commitment"). *See*, McNutt Decl.,
6 ¶ 8.

7 At the end of the day, Judge Lafferty advised that the parties were "very close" with
8 respect to Round Table's final offer. Round Table later learned that the Committee lacked a
9 quorum and consequently was unable to conclude an agreement at the August 30th mediation. *See*,
10 McNutt Decl., ¶ 10. Over the ensuing days, Committee counsel requested various additional
11 concessions, but those requests were all rejected. Counsel also proposed a resumption of the
12 mediation, but that request was rejected as well.

13 On September 1, 2011, Round Table presented its final offer to the Committee at the
14 August 30th Mediation – an exchange of the Enhanced Payment Terms for the Support
15 Commitment – on a "take it or leave it" basis. *See*, McNutt Decl., ¶ 13. Round Table advised that
16 it was unwilling to return to mediation or otherwise alter the proposal. If the proposal was
17 rejected, Round Table would prosecute confirmation of the Joint Plan without the Enhanced
18 Payment Terms. *Id.*

19 On September 6, 2011, the Committee, through its counsel, advised that the Committee
20 accepted the final offer proposed by Round Table at the August 30th mediation (the "Mediation
21 Agreement"). *See*, McNutt Decl., ¶ 14. Counsel explained that the Committee would attempt to
22 extract additional concessions from the ESOP Trustee, but that its commitment to the Mediation
23 Agreement was unconditional. *Id.* Notably, counsel did not identify the Committee's
24 commitment as being conditioned upon backstop provisions or anything else. *Id.* Indeed, no
25 mention was made of any of the Additional Demands, and there had been no discussions with
26 GECC about the backstop following the August 30th mediation. *See*, Lunt Decl., ¶ 6.

27 Having reached agreement so that the Plan would be entirely consensual, Round Table
28 requested a budget for the Committee's professional fees through the conclusion of the case. The

1 Committee's budget dated September 12, 2011 confirmed that it was "based on the settlement
2 reached between the Committee and the Debtors," and anticipated that the Committee's
3 professional fees for the balance of the case would be less than \$80,000. *See*, McNutt Decl., ¶ 15,
4 Ex. B.

5 **D. The Additional Demands**

6 On September 20, 2011, the provisions of the Joint Plan of Reorganization governing
7 treatment of unsecured creditor claims, specifically including the backstop provisions, were
8 circulated in draft to the Committee. *See*, Lunt Decl., ¶ 7. On September 23, 2011, the entire
9 Joint Plan of Reorganization was circulated in draft to the Committee; a substantially identical
10 version was subsequently filed with the Court on September 29, 2011. *See*, McNutt Decl., ¶ 16.
11 The Committee made no comment about either of the Additional Demands until October 11, 2011.

12 On October 11, 2011, more than a month after the settlement had been reached and three
13 weeks after receiving the Plan, counsel for the Committee provided a four-page letter identifying
14 requested revisions to the Joint Plan and Disclosure Statement, but reaffirming its support for the
15 Plan. *See*, McNutt Decl., ¶ 17, Ex. C. Thereafter, it filed a Response to the Disclosure Statement;
16 Docket No. 1047; identifying five specific areas of concern. *See*, McNutt Decl., ¶ 19, Ex. E.
17 Three of the requested revisions were non-controversial or otherwise acceded to. For example,
18 while GECC preferred to receive releases in return for the backstop, it acknowledged that it had
19 not previously established that requirement in negotiations and hence withdrew it from the Joint
20 Plan. *See*, Lunt Decl., ¶ 11.

21 After making modifications in response to the Committee, two demands asserted by the
22 Committee (the "Additional Demands") were outstanding. *See*, McNutt Decl., ¶ 20. Neither had
23 been raised prior to October 11th and neither formed a part of Round Table's final offer at the
24 August 30th mediation which the Committee had expressly accepted. *Id.* Both Additional
25 Demands were just that: additional concessions requested *after* the Mediation Agreement had been
26 reached.

27 First, the Committee demanded that it remain in existence post-confirmation, apparently
28 until all Plan performance had been completed. *See*, McNutt Decl., Ex. C, E. This demand had

1 not been raised prior to the October 11th letter and was entirely unacceptable to the Debtor.
2 Avoiding the expense and disruption of further Committee proceedings had been a factor
3 motivating the Debtor to enter into the Mediation Agreement.

4 Second, the Committee demanded that the backstop shift from assuring an aggregate
5 distribution of \$1.8 million to all unsecured creditors to assuring an aggregate distribution of \$1.8
6 million to backstopped creditors. *See*, McNutt Decl., Ex. C, E. As a practical matter, modifying
7 the backstop as requested would have assured backstopped unsecured creditors of a 90% recovery
8 (assuming that Class 3A was fully subscribed), would have made the Class 3A election
9 implausible, and would have represented an economic concession by GECC to the backstopped
10 unsecured creditors greater than it had ever offered or been asked for. *See*, Lunt Decl., ¶ 11
11 (stating that the Backstop contained in the September 28 Plan accurately reflected the Backstop
12 offered by GECC).

13 **E. The Threatened Examination and Objection**

14 Through an Objection to the Disclosure Statement, filed the day before the Disclosure
15 Statement hearing, the Committee asserted that the Plan did not conform to the “terms to which
16 the Committee agreed.” *See*, McNutt Decl., Ex. E. This was clear revisionism: neither of the two
17 Additional Demands – preserving the Committee in existence post-confirmation and modifying
18 and expanding the backstop mechanism – had ever been even raised at the August 30th Mediation
19 or in connection with the Mediation Agreement. *See*, McNutt Decl., ¶¶ 6-14; *See*, Lunt Decl., ¶ 6.
20 Round Table assumed that this was mere posturing and that the Committee would live up to its
21 Mediation Agreement.

22 The Debtor complied with the Mediation Agreement by prosecuting confirmation of a
23 Joint Plan that contained the Enhanced Payment Terms. Thus, the Committee enjoyed all of the
24 benefits of the Mediation Agreement.

25 The Committee’s equivocal compliance with its Support Commitment under the Mediation
26 Agreement has now evaporated. Through a letter dated November 3, 2011, the Committee stated,
27 in part,
28

The Committee is unanimous in its decision to oppose confirmation. Given this direction, it is necessary for the Committee to resume its 2004 examination in order to fully prepare for the confirmation hearing.

See, McNutt Decl., Ex. F.

The November 3, 2011 letter identified the scope of the proposed examination. *See*, McNutt Decl., Ex. F. It also suggested a return to mediation. *Id.* Since the Committee demonstrated its unwillingness to comply with the Mediation Agreement it previously reached, it is unlikely that anyone would agree to mediate with it ever again.

III. ARGUMENT

A. “Resumption” of the Prior Rule 2004 Examination is Not Available

In June, the Committee sought a Rule 2004 Examination respecting Round Table's June 9th Plan of Reorganization. The 13 items identified as subjects for examination in the current demand relate principally to the current Joint Plan and bear almost no relationship to the subject of the prior Rule 2004 Examination.

As a procedural matter, if the Committee wishes to examine Round Table about the Joint Plan and its anticipated objection to confirmation of the Joint Plan, it must prosecute new discovery focused to that end; it cannot simply gesture in the direction of the prior Rule 2004 Examination.

The Committee must seek new relief from the Court if it wishes to obtain discovery directed to objecting to confirmation of the Joint Plan. If it does so, the Court should deny the request.

B. The Committee's Efforts are Untimely

As the Court has previously noted in the record, a successful reorganization in this case requires prompt confirmation of a Plan and an end to the accrual of professional fees; Transcript of October 6, 2011 Hearing on Franchise Motions, 51:5-52:5. The instant Joint Plan requires that the Effective Date occur before year-end, and the Court has set the confirmation schedule so as to accommodate that requirement.

1 The Committee in this case has engaged in gamesmanship, and its use of timing has been a
2 key element of its strategy. First, the Committee did not even surface the Additional Demands for
3 three full weeks from September 20th, when it received the Plan backstop provisions, until October
4 11th, when it requested that they be dramatically enhanced. Even so, the Committee did not then
5 repudiate the Mediation Agreement or announce its intention to violate its Support Commitments;
6 quite the contrary. Rather, the Committee waited until *after* the Joint Plan, containing the
7 Enhanced Payment Terms, was safely out for balloting.

8 Even then, the Committee further delayed an *additional two weeks* before announcing that
9 it would object to confirmation and intended to pursue discovery. The transparent objective –
10 emphasized by the invitation to return to mediation – is to use the pressure of time, and
11 specifically Round Table’s need to confirm a Plan of Reorganization before year-end, to extort
12 concessions it knew it could obtain no other way.

13 As demonstrated by its delays, the Committee’s current discovery demands are being used
14 for an improper purpose. See, *In re Duratech Indus.*, 241 B.R. 283, 289 (E.D.N.Y. 1999) (“There
15 are, however, limits to the scope of Rule 2004 examinations. Significantly, Rule 2004
16 examinations may not be used for the purposes of abuse or harassment . . .” citing *In re Mittco*,
17 *Inc.*, 44 B.R. 35, 36 (Bankr. E.D. Wisc. 1984) and 9 COLLIER ON BANKRUPTCY ¶2004.01[1] (15th
18 ed. 1996)). There is no absolute right to unlimited discovery; *Wilk v American Medical Assoc.* 27
19 Fed. R. Serv. 2d (Callaghan), 802, (N.D. Ill. 1979); and the Court can use a protective order to
20 exercise discretionary control over the process. *Turnbull v Topeka State Hosp.* 185 F.R.D. 645 (D.
21 Kan. 1999), *remanded*, 255 F.3d 1238, (10th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002)
22 (holding that a court may issue a protective order, independent of Fed. R. Civ. P. 26(c), if
23 necessary to direct conduct of party or counsel.)

24 The Court should not condone the Committee’s gamesmanship. The Committee should
25 not benefit by the tactical use of delay.

26 ///

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1 **C. The Committee Cannot Renege on the Mediation Agreement**

2 Like any other participant in the bankruptcy process, the Committee is bound by its
3 agreements. Here, it entered into the Mediation Agreement, exchanging its Support Commitment
4 for the Enhanced Payment Terms.

5 Having obtained the benefit of the Enhanced Payment Terms, the Committee now seeks to
6 renege, breach its Support Commitment, and expose the estate to risks and substantial expenses.
7 The Court should not condone this conduct. The Committee should be held to the commitments it
8 makes. It should be barred from opposing confirmation of the Joint Plan. *See, In re Ion Media*
9 *Networks, Inc.* 419 B.R. 585 (Bkrtcy. S.D. N.Y 2009) (rejecting for lack of standing objection to
10 plan confirmation presented by creditor who had contractually committed to remain silent in the
11 chapter 11 case).

12
13 DATED: November 11, 2011

Respectfully submitted,

14 McNUTT LAW GROUP, LLP
15 ST. JAMES LAW, P.C.

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17 By: /s/ Michael St. James

18 Michael St. James
19 Attorneys for Debtor
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